

MANATT, PHELPS & PHILLIPS, LLP  
JOHN M. LEBLANC (Bar No. CA 155842)  
Email: jleblanc@manatt.com  
JOHN T. FOGARTY (Bar No. CA 198119)  
E-mail: jfogarty@manatt.com  
11355 West Olympic Boulevard  
Los Angeles, CA 90064-1614  
Telephone: (310) 312-4000  
Facsimile: (310) 312-4224

*Attorneys for Blue Cross Blue Shield of Massachusetts,  
Anthem Blue Cross Blue Shield of New Hampshire, and  
Blue Cross of California*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

LUCAS GONCALVES, a minor, by  
and  
Through his Guardian Ad Litem  
Tony Goncalves,

Plaintiff,

vs.

RADY CHILDREN'S HOSPITAL-  
SAN DIEGO and DOES 1 through  
30, Inclusive,

Defendant.

Case No. '14CV1774 GPC NLS

**NOTICE OF REMOVAL**

Concurrently filed with:

- (1) Notice to adverse parties; and
- (2) Corporate Disclosure Statement and  
Notice of Party with Financial  
Interest.

Originally Filed: February 2, 2011

Blue Cross Blue Shield of Massachusetts ("BCBS-MA"), Anthem Blue  
Cross Blue Shield of New Hampshire ("BCBS-NH"), and Blue Cross of California  
("BC-CA") (collectively, the "Blues") respectfully remove this action to the United  
States District Court for the Southern District of California, and state as follows:

1. The central part of this lawsuit is a medical malpractice action. This  
case was filed by Plaintiff as Case No. 37-2011-00085051-CU-MM-CTL in the  
Superior Court of California, County of San Diego, Central Division. The Plaintiff  
is a minor who, shortly after his birth, was allegedly injured by his medical  
providers, who are the Defendants in this case. The parties have reached a

1 settlement of the medical malpractice claims.

2       2. The Blues administer a health benefits plan that is sponsored by the  
3 federal government and that covers federal employees and annuitants and their  
4 dependents, under which Plaintiff was insured. The federal plan provided  
5 substantial benefits on Plaintiff's behalf in connection with injuries sustained by  
6 Plaintiff as a result of the alleged malpractice that is the subject of this case. Under  
7 the express terms of the federal plan, Plaintiff is obligated to return to the plan  
8 benefits previously paid in connection with an injury whenever Plaintiff recovers  
9 from another party for that same injury, as will be the case here when the settlement  
10 is consummated. Accordingly, the Blues, on behalf of the federal plan, have  
11 asserted liens against Plaintiff's recovery in this case.

12       3. Although none of the Blues are named parties in this case, Plaintiff  
13 filed in the state court "Plaintiff's Motion for an Order Expunging Blue Cross/Blue  
14 Shield's Lien" ("Motion to Expunge") in which Plaintiff seeks to invalidate the  
15 liens asserted by the Blues. Counsel for Plaintiff purports to have sent to the Blues  
16 by facsimile and mail on June 27, 2014, notice of Plaintiff's ex parte application in  
17 the state court to set a hearing date on the Motion to Expunge; Plaintiff's counsel  
18 maintains that she then sent by facsimile and mail to the Blues a copy of the Motion  
19 to Expunge, itself, on July 10, 2014.<sup>1</sup> Pursuant to 28 U.S.C. § 1446(a), a copy of  
20 the Motion to Expunge is attached as Exhibit A-1 to this removal notice, and copies  
21 of all other process, pleadings, or orders purportedly served on the Blues are  
22 attached among Exhibits A-2 through A-9.

23       4. The Blues file this removal notice within the 30-day period required in  
24 28 U.S.C. § 1446(b).

25       5. The Blues remove this case pursuant to 28 U.S.C. § 1442(a)(1), which  
26 permits removal where a person acting under the direction of a federal agency and  
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28 <sup>1</sup> None of the Blues have ever been served with formal process in this case.

its officers is sued for actions taken under color of federal office.

### **Nature of the Case**

6. Plaintiff's father was a federal employee who was enrolled in a health plan governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14. *See* Mot. to Expunge at 2. Plaintiff was enrolled in that plan as a dependent. This plan is the Blue Cross and Blue Shield Service Benefit Plan (or "the Plan"), one of the federal government's health benefits plans for federal employees and annuitants and their dependents. The Plan was created by a federal government contract between the United States Office of Personnel Management ("OPM") and the Blue Cross and Blue Shield Association ("BCBSA") pursuant to FEHBA. *See generally* 2008 Service Benefit Plan Master Contract and 2009-12 amendments (Exs. B-1 - B-5) [hereinafter "2008 Master Contract"]; 2013 Service Benefit Plan Master Contract and 2014 amendment (Exs. C-1 - C-2) [hereinafter "2013 Master Contract"]; *see also* 2008 Statement of Benefits for the Service Benefit Plan at 3 (Ex. D) [hereinafter "2008 Statement of Benefits"]; 2009 Statement of Benefits for the Service Benefit Plan at 3 (Ex. E); 2010 Statement of Benefits for the Service Benefit Plan at 3 (Ex. F) [hereinafter "2010 Statement of Benefits"]; 2011 Statement of Benefits for the Service Benefit Plan at 3 (Ex. G) [hereinafter "2011 Statement of Benefits"]; 2012 Statement of Benefits for the Service Benefit Plan at 3 (Ex. H) [hereinafter "2012 Statement of Benefits"]; 2013 Statement of Benefits for the Service Benefit Plan at 4 (Ex. I) [hereinafter "2013 Statement of Benefits"]; 2014 Statement of Benefits for the Service Benefit Plan at 5 (Ex. J) [hereinafter "2014 Statement of Benefits"].

7. In contracting to establish the Plan, BCBSA acts on behalf of local Blue Cross and Blue Shield companies that administer the Plan in their respective localities; the Blues are such companies and administer the Plan in Massachusetts, New Hampshire, and California (where Plaintiff received treatment for his injuries allegedly caused by Defendants). *See* 2008 Statement of Benefits at 3; 2009

1 Statement of Benefits at 3; 2010 Statement of Benefits at 3; 2011 Statement of  
 2 Benefits at 3; 2012 Statement of Benefits at 3; 2013 Statement of Benefits at 4;  
 3 2014 Statement of Benefits at 5.

4 8. In 2007 or 2008, Plaintiff was being treated at Defendant Rady  
 5 Children's Hospital ("Rady") where he alleged suffered two intestinal perforations  
 6 as a result of Rady's, and others', negligence. Mot. to Expunge at 1-2. In  
 7 connection with the injuries suffered as a result of these intestinal perforations (the  
 8 "Injuries"), Plaintiff received substantial medical treatment. *Id.* at 2. The Plan paid  
 9 benefits of at least \$459,483.57 for the treatment Plaintiff received in connection  
 10 the Injuries. *Id.*; *see also* Decl. of Amy R. Martel, ¶ 2 (July 10, 2014) (Ex. A-2).

11 9. As noted above, Plaintiff alleged in this case that his Injuries were the  
 12 result of Defendants' negligence. Plaintiff and Defendants have reached a  
 13 settlement in this case. *See* Decl. of Amy R. Martel, ¶ 2 (June 30, 2014) (Ex. A-6).  
 14 The Blues understand that settlement to be well in excess of \$1 million.

15 10. The Plan's Statement of Benefits states expressly that the Plan shall  
 16 have a right to reimbursement or subrogation from an enrollee for benefits paid to  
 17 that enrollee, in the event the enrollee recovers for a condition or injury from a third  
 18 party and the Plan had paid benefits in association with that condition or injury.  
 19 2008 Statement of Benefits at 105-06; 2009 Statement of Benefits at 114-15; 2010  
 20 Statement of Benefits at 112; 2011 Statement of Benefits at 135-36; 2012 Statement  
 21 of Benefits at 125-26; 2013 Statement of Benefits at 135-36; 2014 Statement of  
 22 Benefits at 133-34. Pursuant to this provision, the Blues have asserted liens on  
 23 Plaintiff's settlement in amounts equal to the benefits paid on Plaintiff's behalf for  
 24 the Injuries. *See* Mot. to Expunge at 2 (and Exs. 1-3 thereto); Decl. of Amy R.  
 25 Martel, ¶ 2 (July 10, 2014) (Ex. A-2).

26 11. Plaintiff contends that state law – Cal. Civ. Code § 3333.1 – precludes  
 27 the Blues claims for reimbursement. Mot. to Expunge at 3. On this theory,  
 28 Plaintiff asks the state court to find the liens to be "unenforceable" and "to expunge

1 the [Blues'] liens." *Id.* at 6.

2 12. The Plan's express terms, however, require that all of the benefits that  
3 the Plan paid in connection with the Injuries be reimbursed to the Plan.

4 Specifically, those terms state that the Plan is entitled to "[a]ll recoveries" and do  
5 not allow for any amount of the recovery to be retained by the enrollee unless the  
6 Plan has been reimbursed all of the benefits it paid (or the Plan's carrier otherwise  
7 consents in writing, which has not occurred here). 2008 Statement of Benefits at  
8 105-06; 2009 Statement of Benefits at 114-15; 2010 Statement of Benefits at 112;  
9 2011 Statement of Benefits at 135; 2012 Statement of Benefits at 125; 2013  
10 Statement of Benefits at 135-36; 2014 Statement of Benefits at 133.

11 13. Accordingly, under the Plan's express terms as agreed to with OPM,  
12 the Plan is entitled to recover from Plaintiff the entire amount of benefits that it paid  
13 in connection with the Injuries.

#### 14 **Contractual and Regulatory Background**

15 14. FEHBA and the regulations implementing it set forth a comprehensive  
16 framework for the supervision and administration of FEHBA plans, including the  
17 Service Benefit Plan.

18 a. Under FEHBA, OPM is vested with sole authority to contract  
19 for the provision of health plans, to determine the benefit structure of each plan, and  
20 to promulgate the official description of a plan's terms in a Statement of Benefits.  
21 *See* 5 U.S.C. §§ 8902(a), (d), 8907. The Statement of Benefits is incorporated into  
22 the government contract between OPM and BCBSA. *See* 2008 Master Contract  
23 § 2.2(a); 2013 Master Contract § 2.2(a).

24 b. The Statement of Benefits for the Plan states expressly that the  
25 Plan shall have a right to reimbursement or subrogation from an enrollee for  
26 benefits paid to that enrollee, in the event the enrollee recovers for a condition or  
27 injury from a third party and the Plan had paid benefits in association with that  
28 condition or injury. 2008 Statement of Benefits at 105-06; 2009 Statement of

1 Benefits at 114-15; 2010 Statement of Benefits at 112; 2011 Statement of Benefits  
 2 at 135-36; 2012 Statement of Benefits at 125-26; 2013 Statement of Benefits at  
 3 135-36; 2014 Statement of Benefits at 133-34.

4 c. In addition, the federal contract between OPM and BCBSA  
 5 provides:

6 The Carrier's subrogation rights, procedures and policies, including  
 7 recovery rights, for payments with respect to benefits shall be in  
 8 accordance with the provisions of the agreed upon brochure text [*i.e.*,  
 9 the Statement of Benefits], which is incorporated in this Contract in  
 Appendix A. As the member is obligated by Section 2.3(a) to comply  
 with the terms of this Contract, the Carrier, in its discretion, shall have  
 the right to file suit in federal court in order to enforce those rights.

10 2013 Master Contract § 2.5(a); *see also* 2008 Master Contract § 2.5(a);

11 d. The OPM-BCBSA contract also requires the carrier to make "a  
 12 reasonable effort to seek recovery of amounts to which it is entitled to recover in  
 13 cases which are brought to its attention." 2008 Master Contract § 2.5(c) (as  
 14 amended by § 4.1(j)); 2013 Master Contract § 2.5(c) (as amended by § 4.1(m)); *see*  
 15 *also Empire HealthChoice Assurance v. McVeigh*, 547 U.S. 677, 685 (2006)  
 16 (quoting contractual language).

17 e. Congress intended federal employees in every state to be treated  
 18 consistently under FEHBA plans. For example, FEHBA includes a preemption  
 19 provision. 5 U.S.C. § 8902(m)(1) (as amended by the Federal Employees Health  
 20 Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366).  
 21 With this preemption provision, Congress sought to "strengthen the ability of  
 22 national plans to offer uniform benefits and rates to enrollees regardless of where  
 23 they may live." H.R. Rep. No. 105-374, at 9 (1997); *accord* S. Rep. No. 95-903, at  
 24 2 (1978) (legislative history of FEHBA's original preemption provision); *see also*  
 25 *Empire*, 547 U.S. at 686. This policy of nation-wide consistency also applies to  
 26 subrogation and is embodied in the contract between OPM and BCBSA: "[A]ll  
 27 Participating Plans shall subrogate under a single, nation-wide policy to ensure  
 28 equitable and consistent treatment for all Members under the contract." 2008 Master

1 Contract § 2.5(f) (as amended by § 4.1(j)); 2013 Master Contract § 2.5(f) (as  
2 amended by § 4.1(m)).

3 f. Congress delegated solely to OPM the authority to police the  
4 conduct and practices of FEHBA carriers, and the agency has promulgated  
5 extensive regulations on the topic. *See* 5 U.S.C. §§ 8902(e), 8910, 8913(a);  
6 48 C.F.R. Ch. 16; *see also Bridges v. Blue Cross & Blue Shield Ass'n*, 935 F. Supp.  
7 37, 42-43 (D.D.C. 1996); *Kight v. Kaiser Found. Health Plans of the Mid-Atl.*  
8 *States, Inc.*, 34 F. Supp. 2d 334, 342 (E.D. Va. 1999).

9 g. OPM has specifically directed that FEHBA carriers obtain  
10 reimbursement recoveries even when state law purports to prohibit such recoveries.  
11 *See* FEHB Program Carrier Letter (June 18, 2012) (Ex. K) [the “OPM Letter”]. It  
12 is OPM’s view that such state laws are preempted by FEHBA. *Id.*

13 h. Under FEHBA, the federal government pays for the majority of  
14 the premium cost for each enrollee, with the enrollee paying the remainder. *See* 5  
15 U.S.C. § 8906(b)(1), (b)(2), (f). All premiums are deposited initially into the  
16 Employees Health Benefits Fund within the U.S. Treasury. 5 U.S.C. § 8909(a).  
17 Carriers of experience-rated FEHBA plans – such as the Plan (*see, e.g.*, 2008  
18 Master Contract § 3.3(a); 2013 Master Contract § 3.3(a)) – do not receive the  
19 premiums as they are paid into the Employees Health Benefits Fund in the federal  
20 Treasury. Instead, the premiums for the Plan are placed into a special letter of  
21 credit account within the U.S. Treasury fund. 48 C.F.R. § 1632.170(b)(1); *see also*  
22 *id.* § 1652.232-71(d). The Blue Cross and Blue Shield entities administering the  
23 Plan, such as the Blues, then draw directly from the letter of credit account in the  
24 Treasury fund to pay for benefit claims and allowable administrative expenses. *Id.*  
25 §§ 1632.170(b), 1652.216-71(b). Any Plan premiums that are not used to pay  
26 benefits and administrative expenses remain the property of the government, and  
27 are not paid to the carrier. *See, e.g.*, 2013 Master Contract § 3.3. “Pursuant to the  
28 OPM-BCBSA master contract, reimbursements obtained by the carrier must be

1 returned to the Treasury Fund.” *Empire*, 547 U.S. at 685; *see also* 2008 Master  
 2 Contract § 2.5(b); 2013 Master Contract § 2.5(b). Thus, reimbursement recoveries  
 3 obtained by the Blues from Plaintiff relating to this case will be returned to the  
 4 federal Treasury.

### 5 Grounds for Removal

6 15. This case is removable under the Federal Officer Removal Statute, 28  
 7 U.S.C. § 1442(a)(1), which authorizes removal of a proceeding against “any officer  
 8 (or person acting under that officer) of the United States or of any agency thereof,  
 9 in an official capacity, for or relating to any act under color of such office.” 28  
 10 U.S.C. § 1442(a)(1).

11 16. In a recent decision involving the Plan, the Eighth Circuit confirmed  
 12 that FEHBA reimbursement disputes like the one presented in Plaintiff’s Motion to  
 13 Expunge are removable by the Plan’s administrators under the Federal Officer  
 14 Removal Statute. *See Jacks v. Meridian Res. Co.*, 701 F.3d 1224 (8th Cir. 2012).<sup>2</sup>

15 17. To invoke § 1442(a)(1), a private party “must show that (1) it is a  
 16 ‘person’ within the meaning of the statute, (2) a causal nexus exists between  
 17 plaintiffs’ claims and the actions [the removing party] took pursuant to a federal  
 18 officer’s direction, and (3) it has a ‘colorable’ federal defense to plaintiffs’ claims.”  
 19 *Leite v. Crane Co.*, 749 F.3d 1117, 1120 (9th Cir. 2014).

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20 <sup>2</sup> *See also Anesthesiology Assocs. of Tallahassee, Fla., P.A. v. Blue Cross Blue*  
 21 *Shield of Fla.*, No. 03-15664, slip op. at 3-5 (11th Cir. Mar. 18, 2005) (holding that  
 22 Blue Cross Blue Shield entity administering FEHBA plan properly invoked section  
 23 1442(a)(1) to remove claim) (Ex. L); *Ala. Dental Ass’n, v. Blue Cross & Blue*  
 24 *Shield of Ala., Inc.*, No. 2:05-cv-01230-MEF, 2007 U.S. Dist. LEXIS 685, at \*21-  
 25 25 (M.D. Ala. Jan. 3, 2007); *accord Peterson v. Blue Cross/Blue Shield of Tex.*, 508  
 26 F.2d 55, 56-57 (5th Cir. 1975) (holding that Blue Cross Blue Shield entities  
 27 administering Medicare plan properly removed claim brought by provider, pursuant  
 28 to section 1442(a)(1)); *Group Health, Inc. v. Blue Cross Ass’n*, 587 F. Supp. 887,  
 891 (S.D.N.Y. 1984) (same); *Thompson v. Cmty. Ins. Co.*, No. C-3-98-323, 1999  
 U.S. Dist. LEXIS 21725, at \*6-28 (S.D. Ohio Mar. 3, 1999) (holding that HMO  
 administering Medicare plan properly removed case pursuant to section  
 1442(a)(1)); *Holton v. Blue Cross & Blue Shield of S.C.*, 56 F. Supp. 2d 1347,  
 1351-52 (M.D. Ala. 1999) (holding that Blue Cross Blue Shield entity  
 administering health benefits plan for dependents of military retirees properly  
 removed case pursuant to section 1442(a)(1)).

1           18. The first requirement is easily met, as corporations – and private  
2 government contractors in particular – are “persons” within the meaning of the  
3 statute. *See Leite*, 749 F.3d at 1122 n.4.

4           19. As relates to the second requirement, a person is deemed to be sued for  
5 actions under the direction of a federal agency and federal officers where, as is the  
6 case with the Blues’ administration of the Service Benefit Plan here, it is  
7 administering the terms of a federal government contract or federal program under  
8 the direct and detailed supervision of a federal agency. Government contractors  
9 may remove a case pursuant to the Federal Officer Removal Statute where “the acts  
10 for which they are being sued . . . occurred because of what they were asked to do  
11 by the Government,” even if the acts were not “specifically contemplated by the  
12 government contract.” *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137, 138 (2d  
13 Cir. 2008). Here, BCBSA and the Blues (and other local Blue Cross and Blue  
14 Shield companies) “help the government fulfill the basic task of establishing a  
15 health benefits program for federal employees. OPM has direct and extensive  
16 control over these benefit contracts under the FEHBA.” *Jacks*, 701 F.3d at 1233.  
17 “[B]roadly speaking, the subrogation provision [in the OPM-BCBSA contract] is  
18 necessarily a product of the benefit payment process, a process over which OPM  
19 exerts regulatory control.” *Id.* For these reasons, among others, the Eighth Circuit  
20 concluded in *Jacks* that, in making efforts to obtain reimbursement, a local Blue  
21 Cross and Blue Shield company was “acting under” an agency of the United States  
22 within the meaning of 28 U.S.C. § 1442(a)(1). *Jacks*, 701 F.3d at 1230-35. This  
23 case is no different.

24           20. In addition, the “causal nexus” element of the second requirement is  
25 met because Plaintiff’s Motion to Expunge was filed expressly because of the  
26 Blues’ actions taken in the course of administering the Plan – specifically, in paying  
27 benefits and seeking reimbursement following Plaintiff’s recovery from third  
28 parties. As noted above, the Blues’ actions in seeking reimbursement are mandated

1 by OPM in the Service Benefit Plan's Statement of Benefits, the terms of the  
 2 pertinent government contract, and the OPM Letter. On this basis, Plaintiff's  
 3 Motion to Expunge is causally connected to the Blues' actions under the direction  
 4 of a federal agency and its officers. *See id.* at 1230 n.3 (finding the requisite causal  
 5 connection); *see also Leite*, 749 F.3d at 1124.

6 21. The third requirement is met because the Blues have colorable federal  
 7 defenses to Plaintiff's assertion that the Plan's reimbursement rights are invalid.  
 8 First, the claims in Plaintiff's Motion to Expunge are preempted by FEHBA's  
 9 express preemption provision, 5 U.S.C. § 8902(m)(1), which provides that the  
 10 terms of FEHBA contracts concerning benefits and benefits payments shall  
 11 supersede state law. *See Hayes v. Prudential Ins. Co.*, 819 F.2d 921 (9th Cir.  
 12 1987); *see also Calingo v. Meridian Res. Co.*, No. 11 CV 628, 2013 U.S. Dist.  
 13 LEXIS 42759 (S.D.N.Y. Feb. 20, 2013) (finding preemption in FEHBA  
 14 reimbursement dispute); *see also* Ex. K at 2 (OPM Letter). Second, Plaintiff's  
 15 state-law claims are displaced by federal common law, which governs the federal  
 16 contract at the heart of this case. *See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d  
 17 953 (9th Cir. 1996); *Am. Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292  
 18 F.2d 640, 643 (9th Cir. 1961). Third, there is a colorable defense of sovereign  
 19 immunity. In this regard, Plaintiff seeks to override the Plan's terms with  
 20 California state law, thereby interfering with the federal government's  
 21 administration of FEHBA benefits; and Plaintiff pursues a remedy under state law  
 22 to thwart reimbursement that is not permitted against the United States, to whose  
 23 benefit reimbursement recoveries inure. *See Anderson v. Occidental Life Ins. Co.*,  
 24 727 F.2d 855, 856-57 (9th Cir. 1984); *Shands Teaching Hosp. & Clinics, Inc. v.*  
 25 *Beech St. Corp.*, 208 F.3d 1308, 1311-13 (11th Cir. 2000); *Pani v. Empire Blue*  
 26 *Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998). In *Jacks*, the Eighth Circuit  
 27 found each of these three defenses to be colorable for purposes of the Federal  
 28 Officer Removal Statute. *Jacks*, 701 F.3d at 1235.

1           22.    Though the Blues are not formally named parties in the underlying  
2 malpractice case, a litigant need not be a formally named party in order to remove  
3 under the Federal Officer Removal Statute. The Federal Officer Removal Statute  
4 authorizes removal for a “civil action . . . against *or* directed to” a person acting  
5 under a federal officer (28 U.S.C. § 1442(a) (emphasis added)), and a “civil action”  
6 includes “any proceeding (whether or not ancillary to another proceeding) to the  
7 extent that in such proceeding a judicial order . . . is sought or issued.” *Id.*  
8 § 1442(d)(1).

9           23.    Plaintiff maintains that federal jurisdiction is absent in this case  
10 because the apportionment of a minor’s settlement is a matter of state law. *E.g.*,  
11 *Mot. to Expunge* at 2-3. However, even if that were true (and the Blues do not  
12 concede that it is), it is irrelevant under the Federal Officer Removal Statute. The  
13 right of removal under that statute is “absolute” and exists “regardless of whether  
14 the suit could originally have been brought in federal court.” *See, e.g., Willingham*  
15 *v Morgan*, 395 U.S. 402, 406 (1969); *see also Ely Valley Mines, Inc. v. Hartford*  
16 *Accident & Indem. Co.*, 644 F.2d 1310 (9th Cir. 1981) (federal officer removal  
17 statute “is not keyed to the original jurisdiction of the federal district court”).

18           24.    Pursuant to 28 U.S.C. § 1446(d), Defendants will promptly provide  
19 written notice of this removal to the Superior Court of California, County of San  
20 Diego, Central Division.  
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1 Dated: July 28, 2014

MANATT, PHELPS & PHILLIPS, LLP  
John M. LeBlanc  
John T. Fogarty

2  
3  
4 By: /s/ John M. LeBlanc  
John M. LeBlanc  
Attorneys for Blue Cross Blue Shield of  
Massachusetts, Anthem Blue Cross Blue  
5 Shield of New Hampshire, and Blue Cross  
6 of California  
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